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4709 Nos. 07-394 and 06-1666

IN THE

# Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, *et al.*,

*Petitioners,*

—v.—

SANDRA K. OMAR and AHMED S. OMAR,
as next friends of Shawqi Ahmad Omar,

*Respondents.*

*(Caption continued on inside cover)*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR *AMICI CURIAE* PROFESSORS OF CONSTITUTIONAL LAW AND OF THE FEDERAL COURTS IN SUPPORT OF THE HABEAS PETITIONERS


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## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iii

INTEREST OF *AMICI CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 4

I. TWO CENTURIES OF THE WRIT OF HABEAS CORPUS ..... 4

A. The Nineteenth Century ..... 4

B. The Second World War ..... 10

C. From the 1960s to the Present ..... 19

II. THIS COURT'S JURISPRUDENCE IDENTIFIES KEY FACTORS THAT AFFECT THE AVAILABILITY OF HABEAS CORPUS ..... 23

A. Status of the Detainee in Correlation with Other Key Factors ..... 25

B. The Source of the Detention Authority ..... 27

1. Executive Detention Absent Judicial or Military Proceedings ..... 27

2. Military Tribunals ..... 28

3. Foreign Tribunals ..... 29

C. Statutory and Constitutional Predicates for Habeas Jurisdiction..... 30

III. UNDER THIS COURT'S PRECEDENTS, THE KEY FACTORS BARRED HABEAS AVAILABILITY IN *HIROTA* AND REQUIRE IT FOR OMAR AND MUNAF ..... 31

CONCLUSION ..... 34

APPENDIX A LIST OF *AMICI CURIAE* ..... 1

# TABLE OF AUTHORITIES

Page

## Cases

*Ahrens v. Clark*, 335 U.S. 188 (1948) ..... 13

*Ex parte Betz*, 329 U.S. 672 (1946) ..... 11, 26, 33

*Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) ..... 4, 5, 6, 30

*Boumediene v. Bush*, 127 S. Ct. 1478, *reh'g granted, order vacated by* 127 S. Ct. 3078 (2007) ..... 31

*Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973) ..... 19, 20

*Brown v. Allen*, 344 U.S. 443 (1953) ..... 27

*Burns v. Wilson*, 346 U.S. 137 (1953) ..... 15, 16, 25, 28, 33

*Burns v. Wilson*, 346 U.S. 844 (1953) ..... 15, 16

*In re Bush*, 336 U.S. 971 (1949) ..... 13, 26, 33

*Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858) ..... 7, 28

*Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949), *rev'd sub nom. Johnson v. Eisentrager*, 339 U.S. 763 (1950) ..... 14

*Everett ex rel. Bersin v. Truman*, 334 U.S. 824 (1948) ..... 12

TABLE OF AUTHORITIES—Continued

Page

*Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) ..... 21

*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) ..... 22, 23, 25, 28

*Ex parte Hayes*, 414 U.S. 1327 (1973)..... 16

*Hirota v. MacArthur*, 338 U.S. 197 (1948) .....*passim*

*INS v. St. Cyr*, 533 U.S. 289 (2001) .....*passim*

*Johnson v. Eisentrager*, 339 U.S. 763 (1950) ..... 14, 15, 26, 32

*In re Kaine*, 55 U.S. (14 How.) 103 (1852)..... 9, 25, 30

*Madsen v. Kinsella*, 343 U.S. 341 (1952)..... 18, 26

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) ..... 4

*Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869) ..... 8, 9, 30

*Milch v. United States*, 332 U.S. 789 (1947)..... 12

*Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) ..... 6, 7, 28

*Neely v. Henkel*, 180 U.S. 109 (1901)..... 10, 29, 34

*O'Callahan v. Parker*, 395 U.S. 258 (1969) ..... 18

*Padilla v. Hanft*, 547 U.S. 1062 (2006)..... 31

TABLE OF AUTHORITIES—Continued

Page

*Ex parte Quirin*, 317 U.S. 1 (1942) ..... 10, 11, 28

*Rasul v. Bush*, 542 U.S. 466 (2004) .....*passim*

*Reid v. Covert*, 354 U.S. 1 (1957) ..... 17, 18, 26, 28, 33

*Rumsfeld v. Padilla*, 542 U.S. 426 (2004)..... 20, 21

*Solorio v. United States*, 483 U.S. 435 (1987) ..... 18

*United States ex rel. Toth v. Quarles*,
350 U.S. 11 (1955) ..... 16, 28, 33

*Ex parte Vallandigham*, 68 U.S. (1 Wall.)
243 (1864) ..... 6, 28, 30

*Wales v. Whitney*, 114 U.S. 564 (1885) ..... 19, 20

*Wilson v. Girard*, 354 U.S. 524
(1957) .....*passim*

*In re Yamashita*, 327 U.S. 1 (1946)..... 11, 28, 32

*Ex parte Yerger*, 75 U.S. (8 Wall.)
85 (1869) ..... 8, 9, 28, 30

**Constitutions, Statutes & Rules**

U.S. Const., art. III, § 2, cl. 2 ..... 5

28 U.S.C. § 452 ..... 13

28 U.S.C. § 2241 .....*passim*

TABLE OF AUTHORITIES—Continued

Page

Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 ..... 8

Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44 ..... 8

Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73 ..... 4

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ..... 22

Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739 ..... 21

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 ..... 22

Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ..... 27

Proclamation of Sept. 24, 1862, 13 Stat. 730 ..... 5

**Other Authorities**

Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 Colum. L. Rev. 1002 (2007) ..... 5, 24

William F. Duker, *A Constitutional History of Habeas Corpus* (1980) ..... 24

TABLE OF AUTHORITIES—Continued

Page

Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* (5th ed. 2003) ..... 11

Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029 (2007) ..... 2, 16, 17

Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961 (1998) ..... 24

Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1 (2001) ..... 15, 24

## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* listed in Appendix A are professors of constitutional law and of the federal courts. *Amici* hold different views on many issues related to federal courts jurisprudence as well as the theories and interpretive practices of constitutional law. Nevertheless, they share a commitment to understanding the application of this Court's precedents to contemporary questions regarding the scope of habeas corpus jurisdiction.

## SUMMARY OF ARGUMENT

In the courts below, the habeas petitioners, acting as next friends for Shawqi Omar and Mohammad Munaf, and the responding federal parties debated the availability of federal habeas jurisdiction. In particular, the federal parties argued that the World War II-era decision in *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam), governs the threshold question of jurisdiction and bars the habeas petitioners from access to the federal courts. In response, Omar and Munaf contended that *Hirota* presents a wholly distinguishable procedural and factual context that does not require denial of jurisdiction, as they

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

*Amici* thank University of Texas School of Law students Joe Conley and David Currie for research assistance.

alleged that they are detainees "in custody under or by color of the authority of the United States"; and their detention is "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(1), (3).

In this brief, *amici* review the case law of this Court on the availability of jurisdiction when individuals allege wrongful detention by the federal executive. *Amici* focus on explaining when, under the Court's existing precedents, federal habeas jurisdiction is available to consider a petitioner's claims, and do not address questions about the scope of review or forms of relief.[2]

Part I provides a chronological review of how the question of habeas jurisdiction has been framed and decided by this Court in prior cases and identifies the relevant factors affecting the jurisdictional analysis. Drawing upon these precedents, Part II specifies several factors that have been central to this Court's determinations concerning jurisdiction in habeas cases, including: (1) the status of the detainee (e.g., U.S. citizen or foreign national, civilian or enemy); (2) the location of the detention and of the custodian; (3) the source of the authority for detention (including the kind and nature of the tribunal, court or person authorizing

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[2] For a discussion of this Court's cases that inform the standard of review on the merits of a habeas petition, see, for example, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2095-2108 (2007).

detention); (4) the court in which the petitioner initiated the habeas petition; and (5) the statutory or constitutional jurisdictional predicates relied upon.

In Part III, *amici* show how the factors delineated in Part II would be expected to preclude federal jurisdiction in *Hirota* but would require it here. Specifically, in *Hirota*, the petitioners were foreign nationals who had been detained outside of the territorial United States pursuant to the final judgment and sentence of an apparently properly constituted international military tribunal. They sought to attack that judgment and sentence through an original application to the Supreme Court for a writ of habeas corpus. This Court denied their petitions, holding that "[u]nder the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed . . . ." 338 U.S. at 198. In contrast, Omar and Munaf are American citizens held by U.S. forces; they challenge their detention by the United States, and they initiated their request for habeas review in the lower federal courts before any final judgment had been entered in any other court. Under these circumstances, the Court's federal detention jurisprudence supports the exercise of habeas jurisdiction.

When this Court's precedents are read together, it becomes plain that no single decision—including *Hirota*—has directly addressed the specific factual and procedural circumstances presented by Omar and Munaf. Collectively, however, the prior rulings demonstrate that on the facts alleged, Omar

and Munaf fit comfortably within the group of habeas petitioners who may invoke federal court jurisdiction. Indeed, it would be a departure from this Court's habeas precedents to conclude otherwise.

## ARGUMENT

### I. Two Centuries of the Writ of Habeas Corpus

Throughout our nation's history, the federal courts have identified circumstances in which habeas jurisdiction may be invoked in cases involving federal executive detention. Surveying those cases, Part I.A describes the development of the Court's habeas jurisprudence from its beginnings in the nineteenth century through the Civil War to the early twentieth century. Part I.B explores the Court's relevant habeas decisions in the World War II era. Part I.C reviews the Court's habeas rulings over the course of the last fifty years, including the Court's post-September 11, 2001 decisions addressing the detention of citizens and foreign nationals.

#### A. The Nineteenth Century

The Judiciary Act of 1789 (the "Judiciary Act") directly empowered the Court to issue writs of habeas corpus, *see* Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82, but the Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the Judiciary Act could not expand the Court's Article III original jurisdiction to issue writs of mandamus, called the statutory grant into question. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the

Court decided that, under the circumstances presented, it could constitutionally exercise jurisdiction to issue habeas writs. The petitioners in *Bollman* sought original habeas relief from the Supreme Court under § 14 of the Judiciary Act after a federal circuit court ordered them imprisoned pending trial for treason. 8 U.S. (4 Cranch) at 108-23, 135-36. Chief Justice Marshall's opinion for the Court held that the Judiciary Act's habeas grant came within the Court's appellate jurisdiction, U.S. Const. art. III, § 2, cl. 2, because the writ "is the revision of a decision of an inferior court, by which a citizen has been committed to jail." *Bollman*, 8 U.S. (4 Cranch) at 101.[3]

During the Civil War and after, the Court ruled on several additional cases raising issues about its habeas jurisdiction and the scope of habeas review. Given that President Lincoln had ordered military trials for "all rebels and insurgents, their aiders and abettors within the United States" and others alleged to have impeded the Union's war efforts and had also suspended the writ of habeas corpus for such prisoners, *see* Proclamation of Sept. 24, 1862, 13 Stat. 730, many of these cases concerned the jurisdiction of the federal courts to hear challenges to the proceedings and judgments of military commissions.

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[3] Analyses have been put forth suggesting that the Court could have held otherwise. *See, e.g.*, Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 Colum. L. Rev. 1002, 1036-42 (2007).

In *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864), in response to an application for review through common law certiorari, the Court held that it had no jurisdiction to review the proceedings of a military commission. There, an Ohio citizen was tried, convicted and sentenced by military commission for publicly sympathizing with the Confederacy. *Id.* at 243-47. The judgment was approved by General Burnside, commander of the military department of Ohio. *Id.* at 247-48. The Court ruled that "the authority to be exercised by a military commission is [not] judicial," and that the military commission was not a lower court. *Id.* at 253. Because the Supreme Court previously had defined its constitutional appellate power to be the revision of a lower court's decision, *see Bollman*, 8 U.S. (4 Cranch) at 101, the Court concluded that, absent an intervening lower court decision, it could neither directly review nor issue a writ of habeas corpus as to the military commission's proceedings. *See Vallandigham*, 68 U.S. (1 Wall.) at 253.

But shortly after the Civil War ended, the Court determined in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), that there were circumstances in which it had Article III appellate jurisdiction to review a habeas petition challenging detention pursuant to a military commission's judgment after that detention was first reviewed by a lower federal court. Milligan, a citizen of Indiana, was charged with conspiring against the United States. *Id.* at 6-7, 107. Although federal and state courts continued to function in Indiana throughout the Civil War, *id.* at 121-22, 126-27, Milligan was tried there by military commission and sentenced to death, *id.* at

107. Milligan then sought habeas review in the federal circuit court, which divided over his claims and certified them to the Supreme Court. *Id.* at 108-12.

The Court exercised jurisdiction over Milligan's claims, confirming that, in the posture of reviewing the circuit court's certification, the Court had both statutory and Article III appellate jurisdiction. *See id.* at 114, 118. The *Milligan* Court also addressed the scope of habeas review that the federal courts could give to a military commission's sentence. Before the Civil War, the Court had held that because a court-martial is not a true court, its sentence "is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever," unless the court-martial lacked jurisdiction over the case or "failed to observe the rules prescribed by the statute for . . . exercise [of its jurisdiction]." *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 81 (1858). Consistent with *Dynes*, the Court observed in *Milligan* that the "controlling question" was whether the military commission had "*jurisdiction*, legally, to try and sentence [Milligan.]" 71 U.S. (4 Wall.) at 118. It then construed the meaning of a jurisdictional challenge broadly to permit consideration of Milligan's constitutional claims under the Fourth, Fifth and Sixth Amendments, and held that the commission had no jurisdiction to try him because "[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." *Id.* at 127.

After *Milligan*, this Court adhered to the view that it could use habeas writs to inquire into the

jurisdiction of military commissions, so long as a lower federal court had first passed on the issue. In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), the Court addressed an appeal from a circuit court's order denying the petitioner habeas relief on the merits and remanding him to federal military custody to await trial by military commission. *Id.* at 508. While McCardle's case was pending in this Court, Congress repealed the portion of the 1867 statute that authorized his appeal. *Id.* at 508-09.[4] The Supreme Court held that the repeal deprived it of statutory authority to hear McCardle's appeal, *id.* at 514, but the Court stated that the repeal did "not affect the jurisdiction which was previously exercised" by the Supreme Court in habeas cases, *id.* at 515. The Supreme Court confirmed this in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), holding that "in all cases where" a federal circuit court "caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken," the Supreme Court has appellate jurisdiction to issue an original writ of habeas corpus under the Judiciary Act to "revise the decision of the Circuit Court, and if

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[4] The 1867 act authorized federal judges "to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. In 1868 however, Congress enacted a law repealing "so much of" the 1867 act "as authorizes an appeal from the judgment of the circuit court to the Supreme Court" in habeas cases. Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44.

it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded." *Id.* at 103. The Court explained that Congress's repeal of the 1867 statute at issue in *McCardle* did not specifically repeal the Court's jurisdiction under the Judiciary Act, and would not be interpreted as doing so, since "[r]epeals by implication are not favored." *Id.* at 105.

The Court's nineteenth century cases also addressed the availability of habeas review in extradition proceedings for both U.S. citizens and foreign nationals. In those cases, the Court did not question the general availability of habeas relief to foreigners challenging detention by the federal government in the United States. Thus, in *In re Kaine*, 55 U.S. (14 How.) 103 (1852) (plurality), where the petitioner was an Irish citizen imprisoned pending extradition on attempted murder charges, *id.* at 103-04, 108-09 (plurality), seven Justices of this Court agreed that the Supreme Court had jurisdiction to issue the writ, *see Yerger*, 75 U.S. (8 Wall.) at 100 (discussing *Kaine*). Although the Court ultimately denied relief "on the merits," *Kaine*, 55 U.S. (14 How.) at 117 (plurality), a plurality of the Court observed that "a foreign criminal . . . has every benefit of the writ of *habeas corpus*[,]" *id.* at 114 (plurality). Three dissenting Justices also believed there was jurisdiction, *id.* at 134-36 , 148 (dissenting ops.), observing that "under our system of laws and principles of government, so far as respects personal security and personal freedom," there is "no distinction between the citizen and the alien who has sought asylum under them," *id.* at 141 (Nelson, J., dissenting).

Later in *Neely v. Henkel*, 180 U.S. 109 (1901), the Court entertained the habeas petition of a U.S. citizen detained in the United States for extradition to Cuba to face embezzlement charges. *Id.* at 112-15. The Court there held that the petitioner was not entitled to habeas relief just because Cuban law did not afford him all the procedural protections of the Constitution. *Id.* at 122. His citizenship "d[id] not . . . entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled," unless a treaty so provided. *Id.* at 123. The Court noted, however, that the governing statute guaranteed that the person subject to extradition would receive a "fair and impartial trial." *Id.* Further, the Court stated that the trial the prisoner received must be "without discrimination against the accused because of his American citizenship." *Id.*

### B. The Second World War

The United States' involvement in the Second World War and its resulting global presence brought additional habeas issues before the Court. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court described how would-be saboteurs (several Germans and one alleged U.S. citizen) were captured in the United States and tried by a U.S. military tribunal in the United States for violating the law of war. *Id.* at 20-23. The Court affirmed the district court's exercise of habeas jurisdiction to consider whether the "petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." *Id.* at 24-

25. The Court concluded that the military tribunal had jurisdiction, and that the petitioners were not entitled to trial in the civil courts because they were charged with being unlawful enemy combatants. *Id.* at 29-46 (distinguishing *Milligan* on this ground).

Following *Quirin*, in *In re Yamashita*, 327 U.S. 1 (1946), the Court reached the merits of the habeas petition of a Japanese general who surrendered to U.S. forces in the Philippines (then a U.S. territory), and was sentenced to death for war crimes by a U.S. military tribunal in the Philippines. *Id.* at 5, 9. After the Supreme Court of the Philippines rejected his habeas petition on the merits, Yamashita applied to this Court for both an original writ of habeas corpus and a writ of certiorari. *Id.* at 4, 6-7. The Court declined to grant either writ, finding that the military tribunal was lawfully authorized despite being convened after hostilities with Japan had ended. *Id.* at 9-26.

Yamashita's petition, which in part sought to invoke this Court's original jurisdiction, started a trend of original habeas applications to the Supreme Court from detainees tried by U.S. or international military tribunals abroad. Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 316 (5th ed. 2003). Initially, a divided Court summarily dismissed these petitions, although the dismissal orders reflected some disagreement among the Justices as to whether the Court should hear argument on the question of jurisdiction. *See, e.g.*, *Ex parte Betz*, 329 U.S. 672 (1946) (mem.) (denying leave to file "for want of original jurisdiction," with Justices Black and

Rutledge of the view that the motion "should be denied without prejudice to it being filed in the appropriate District Court" and Justice Murphy wishing to hear oral argument); *Everett ex rel. Bersin v. Truman*, 334 U.S. 824 (1948) (mem.) (denying leave, with a four-to-four disagreement among the Justices about whether to hear the case); *see also Milch v. United States*, 332 U.S. 789 (1947) (mem.) (denying leave, with Justices Black, Douglas, Murphy, and Rutledge "of the opinion that the petition should be set for hearing on the question of the jurisdiction of this Court").

In *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam), the Court was again faced with applications for leave to file original petitions. *See id.* at 198. Unlike the previous cases, the Court elected to hear oral argument and issued a brief per curiam opinion. As the Court explained, "[t]he petitioners, all residents and citizens of Japan, [were] held in custody pursuant to the judgments of a military tribunal in Japan." *Id.* The petitioners "filed motions in this Court for leave to file petitions for habeas corpus." *Id.* The Court then stated that it was "satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States," and that the tribunal was established by General Douglas MacArthur acting "as the agent of the Allied Powers." *Id.* "Under the foregoing circumstances," the Court explained, "the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners . . . ." *Id.* Concurring in the judgment, Justice Douglas questioned whether *Hirota*'s holding could properly be applied to a U.S.

citizen. *See* 338 U.S. at 205 (Douglas, J., concurring) ("I cannot believe that we would adhere to [the majority's] formula if these petitioners were American citizens.").

After *Hirota*, the Court continued its practice of denying leave to file petitions for original writs. Thus, in *In re Bush*, 336 U.S. 971 (1949) (mem.), where a U.S. citizen—criminally convicted by a U.S. provost court in Japan—sought leave to file an original petition, the Court denied the motion but did so "without prejudice to the right to apply to any appropriate court that may have jurisdiction." *Id.* at 971.

The Court also faced cases challenging the district courts' statutory jurisdiction to issue habeas writs "within their respective jurisdictions" absent the physical presence of the petitioner or of the custodian. *See* 28 U.S.C. § 452 (1940) (current version at 28 U.S.C. § 2241(a) (1970)). In *Ahrens v. Clark*, 335 U.S. 188 (1948), the Court considered petitions filed in the D.C. district court by 120 German enemy aliens detained at Ellis Island, New York, under an order of removal from the U.S. Attorney General. *Id.* at 189. The Court concluded that statutory jurisdiction was lacking because the detainees were never within the D.C. district court's jurisdiction, and it was "not sufficient . . . that the jailer or custodian alone be found in the jurisdiction." *Id.* at 190. Although the Court reserved the question whether its holding applied to "a person confined in an area not subject to the jurisdiction of any district court," *id.* at 192 n.4, the dissent contended that the majority implicitly held that it did, *id.* at 195-96

(Rutledge, J., dissenting) (asking, "is there to be no remedy, even though it is American citizens who are wrongfully deprived of their liberty and Americans answerable to no other power who deprive them of it . . . ?").

As Justice Rutledge, dissenting in *Ahrens*, and Justice Douglas, concurring in *Hirota*, highlighted, the detainee's citizenship has been an important element of the jurisdictional calculus. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court refused to hear the petitions of 21 German citizens, alleged to be enemy combatants, detained in Germany by the U.S. Army pursuant to convictions for violating the laws of war by a U.S. military tribunal convened in China. *Id.* at 765-66, 790-91. Citing *Ahrens*, the district court had rejected the petitions for lack of statutory jurisdiction. However, the court of appeals reversed, reasoning that, even if, under *Ahrens*, statutory jurisdiction was not specifically provided, foreign nationals enjoyed constitutional rights and therefore the writ ought to be available when such rights were violated. *Eisentrager v. Forrestal*, 174 F.2d 961, 963-65 (D.C. Cir. 1949), *rev'd sub nom. Johnson v. Eisentrager*, 339 U.S. 763 (1950).

The Supreme Court reversed the D.C. Circuit but not on *Ahrens* grounds. Rather the Court held that enemy aliens who had no relationship with the United States had "no basis for invoking federal judicial power in any district" in the first place. *Eisentrager*, 339 U.S. at 790. The Court explained that the petitioners, who had been convicted in China and detained in Germany, were not "entitled, as a constitutional right, to sue in some court of the

United States for a writ of habeas corpus." *Id.* at 768-77. The Court contrasted the status of those foreign nationals with those who enjoyed the "high privilege" of citizenship. *Id.* at 770. "Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar," the Court explained. "The years have not . . . sapped the vitality of a citizen's claims upon his government for protection." *Id.* at 769-70.[5]

Although the *Eisentrager* Court had no occasion to address whether U.S. citizens detained abroad were statutorily barred from invoking federal habeas jurisdiction under *Ahrens*, two later decisions implicitly answered the question by invoking such habeas jurisdiction as to U.S. citizens. In *Burns v. Wilson*, 346 U.S. 137 (1953) (plurality), the Court heard appeals from habeas petitions filed by two U.S. soldiers in the D.C. district court challenging their court-martial convictions in Guam and their subsequent detention in Japan. *Id.* at 138-39; *Burns v. Wilson*, 346 U.S. 844, 851 (1953) (Frankfurter, J., dissenting from the denial of rehearing). Although the Court found that "[t]he federal civil courts have jurisdiction over" habeas petitions alleging imprisonment and sentencing in violation of the

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[5] On a view that habeas is not solely a means of vindicating individual rights but also a means of enforcing the structural restraints imposed by the Constitution on the government's conduct, *Eisentrager* may have been wrong to distinguish between citizens and foreign nationals. *See, e.g.*, Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1, 19, 25 (2001).

Constitution, *Burns*, 346 U.S. at 139 & n.1 (citing § 2241 and *Yamashita*), it denied the writs on their merits, holding that the courts-martial gave adequate consideration to the petitioners' claims, *id.* at 146. Dissenting from the Court's subsequent denial of a rehearing, Justice Frankfurter objected that the Court overlooked the statutory jurisdictional issue, reserved in both *Ahrens* and *Eisentrager*, but squarely presented in *Burns*: "whether an American citizen detained by federal officers outside of any federal judicial district," here, in Japan, "may maintain habeas corpus directed against the official superior of the officers actually having him in custody." *Burns*, 346 U.S. at 851-52 (Frankfurter, J., dissenting).

Soon thereafter, in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the Court again reached the merits of a habeas petition filed by a U.S. citizen detained abroad. Toth, an ex-serviceman in the Korean War, was arrested in the United States and returned to Korea, where he was convicted by a U.S. court-martial of murder. *Id.* at 13. While imprisoned in Korea, he petitioned the D.C. district court for a writ of habeas corpus. *Id.* at 13 n.3. On appeal, the Supreme Court granted the writ, holding that Congress could not "subject civilians like Toth to trial by court-martial." *Id.* at 23. The Court never questioned whether it had habeas jurisdiction, notwithstanding Justice Frankfurter's *Burns* dissent just two years earlier. *See* Fallon & Meltzer, *supra* note 2, at 2054; *see also Ex parte Hayes*, 414 U.S. 1327, 1328-29 (1973) (Douglas, Circuit Justice) (asserting that *Burns* and *Toth* decided "sub silentio and by fiat, that at least a citizen held abroad by

federal authorities has access to the writ in the District of Columbia").

Consistent with these decisions, the Court recognized in *Reid v. Covert*, 354 U.S. 1 (1957) (plurality), "that citizens retain constitutional rights even when tried abroad by a military tribunal." Fallon & Meltzer, *supra* note 2, at 2054.[6] In *Reid*, the Court heard the habeas petition of a U.S. civilian convicted by a U.S. court-martial in England of murdering her U.S. serviceman-husband and subsequently imprisoned in the United States. 354 U.S. at 3-4. The government argued that although that proceeding had not included a jury, jurisdiction was proper pursuant to an agreement with Great Britain permitting the United States "to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents." *Id.* at 15 & n.29. The Court disagreed and ruled that the military did not have jurisdiction to try civilians. *Id.* at 40-41. Justice Black's plurality opinion rejected "the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights," *id.* at 5, and explained

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[6] As Professors Fallon and Meltzer have observed, "[i]f the Constitution demands that some court have jurisdiction to hear constitutional claims asserted by citizens subject to executive detention," then the decisions in *Burns* and *Toth* "were not merely statutory adjustments but performed a deeper function of avoiding the serious constitutional question that a contrary ruling would have raised." Fallon & Meltzer, *supra* note 2, at 2054.

that "under our Constitution courts of law alone are given power to try civilians," *id.* at 40.[7]

Two other decisions of this Court are relevant to the availability of habeas jurisdiction specifically for U.S. citizens abroad. Both involved detention based upon a relationship to international authority. In *Madsen v. Kinsella*, 343 U.S. 341 (1952), a U.S. civilian in U.S.-occupied Germany was convicted of murder by the "United States Court of the Allied High Commission for Germany," a court established by a law passed by the "Allied High Commission." *Id.* at 342-44 & n.3, 370-71. After being imprisoned in West Virginia, she petitioned the district court there for habeas corpus. *Id.* at 343, 345. On appeal, the Court exercised jurisdiction over her petition but denied the writ, finding on the merits that the military commission had the authority to try her. *Id.* at 362.

In *Wilson v. Girard*, 354 U.S. 524 (1957) (per curiam), the Court, without discussing jurisdiction, heard the merits of the habeas petition of a U.S. soldier whom the United States held in Japan pursuant to an indictment by a Japanese court charging that he had killed a Japanese civilian. *Id.* at 525-26. Under a treaty between the two nations,

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[7] While *Reid* held that a U.S. civilian could not constitutionally be tried by court-martial, a member of the U.S. military may be tried by court martial, regardless of whether the offense committed is connected to that member's service to the military. *See Solorio v. United States*, 483 U.S. 435, 436 (1987) (overruling *O'Callahan v. Parker*, 395 U.S. 258 (1969)).

the United States agreed to waive its jurisdiction to try Girard and deliver him "to the Japanese authorities for trial." *Id.* at 526-29. However, before the United States could deliver him, Girard filed for a writ with the D.C. district court. *Id.* at 526, 543. The Supreme Court granted certiorari and exercised jurisdiction to deny the writ on the merits, concluding that the treaty validly authorized Japan to exercise jurisdiction. *Id.* at 526-30.

### C. From the 1960s to the Present

In 1973, in *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), the Court revisited its construction of 28 U.S.C. § 2241 in *Ahrens* requiring the physical presence of a petitioner as a predicate to statutory jurisdiction. In *Braden*, a prisoner serving an unrelated sentence in an Alabama prison brought a habeas petition in Kentucky against a detainer issued by a Kentucky court. *Id.* at 485-87. The Supreme Court concluded that § 2241's provision for district courts to grant habeas writs "within their respective jurisdictions" need not be read, as it had been in *Ahrens*, to invariably require "the prisoner's presence within the territorial confines of the district . . . ." 410 U.S. at 495. Rather, jurisdiction was proper in the Kentucky district court because the writ of habeas corpus "does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Id.* at 494-95 (citing *Wales v. Whitney*, 114 U.S. 564, 574 (1885)).

In light of intervening congressional and jurisprudential developments, the *Braden* Court

concluded that traditional principles of venue would alleviate the forum-shopping concerns that animated the *Ahrens* decision and that the Court could "no longer view that decision as establishing an inflexible jurisdictional rule, dictating the choice of an inconvenient forum even in a class of cases which could not have been foreseen at the time of our decision." *Id.* at 499-500. Among the jurisprudential developments cited in *Braden* were the Court's decisions involving American habeas petitioners in custody outside of the United States (and the territory of any federal district court) where the Court "held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Id.* at 498 (citations omitted).

This Court's more recent decision in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), reaffirmed the "immediate custodian" rule of *Wales*, which interpreted the provisions of the habeas statute then applicable as contemplating "'a proceeding against some person who has the *immediate custody* of the party detained . . . .'" *Id.* at 435 (quoting *Wales*, 114 U.S. at 574). In particular, *Padilla* recognized that in "core challenges" to present, physical confinement (as distinct from the type of challenge at issue in *Braden*), a habeas petitioner must name his "immediate custodian"—and not some distant official or abstract entity—as his respondent. *Id.* at 436, 438-39. Nevertheless, the *Padilla* Court noted that jurisdiction for those outside the United States posed a different issue: "We have long implicitly recognized an exception to the immediate custodian rule in the military context where an American

citizen is detained outside the territorial jurisdiction of any district court." *Id.* at 436 n.9.

In *Rasul v. Bush*, 542 U.S. 466 (2004), decided the same day as *Padilla*, the Court held that non-citizens detained by the U.S. military at the Guantánamo Bay Naval Base ("Guantánamo") in Cuba were able to invoke the statutory jurisdiction of the federal courts. *Id.* at 470-71, 485. The *Rasul* petitioners were foreign nationals captured abroad and held as "enemy combatants" by U.S. military forces at Guantánamo—"a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" *Id.* at 475 (footnote omitted). Because *Braden* "overruled the statutory predicate to *Eisentrager's* holding"—namely, the *Ahrens* Court's construction of the habeas statute—the Court reasoned that "*Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims." *Id.* at 479 (footnote omitted). Further, the Court concluded that because the habeas statute does not distinguish between American citizens and foreign nationals held in federal custody and because the respondents in *Rasul* conceded that the habeas statute would create jurisdiction for the claims of an American citizen held at Guantánamo, "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241." *Id.* at 481; *cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 n.15 (2006) (exercising the jurisdiction upheld in *Rasul* over petitions of non-citizens detained by U.S. forces in Guantánamo and holding, *inter alia*, that the Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739 (the "DTA"), did not deprive

federal courts of jurisdiction to hear the previously pending habeas petition of a foreign national held as an "enemy combatant" at Guantánamo).

As efforts to combat terrorism and illegal immigration increasingly occupied Congress in the 1990s and following the events of September 11, 2001, the Court addressed several legislative amendments to the habeas statute, seeking to reconcile those amendments with the requirements of the Suspension Clause. For example, in the summer of 2001, the Court held in *INS v. St. Cyr*, 533 U.S. 289 (2001), that neither the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, nor the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546, deprived federal courts of jurisdiction to review under § 2241 the habeas petition of a permanent resident alien challenging aspects of his removal proceedings. 533 U.S. at 293, 297, 314. The Court explained that the writ "has always been available to review the legality of Executive detention," *id.* at 305 (collecting cases), and habeas jurisdiction has been "regularly invoked on behalf of noncitizens, particularly in the immigration context," *id.* (citations omitted). The Court declined to construe the amendments as precluding habeas jurisdiction in possible contravention of the Suspension Clause, because doing so "would give rise to substantial constitutional questions." *Id.* at 300.

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality), the Court considered the legality of the Government's detention of indefinite duration of a

U.S. citizen as an "enemy combatant," where the detainee had been seized abroad before being transferred to Guantánamo and then to a naval facility within the United States. *Id.* at 509-10. A majority of Justices agreed with the respondent that Congress had sanctioned the detention in question under 2001 legislation. *Id.* at 517 (plurality); *id.* at 587 (Thomas, J., dissenting). A different majority concluded that such authorization did not preclude judicial review of the detention. *Id.* at 536-37 (plurality); *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). As Justice O'Connor stated, any threats to military operations posed by independent review did not trump "a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator." *Id.* at 535 (plurality). Absent suspension of the habeas corpus writ, "a citizen detained as an enemy combatant is entitled to this process." *Id.* at 537 (plurality). While disagreement existed as to the appropriate scope and nature of any habeas review, it was thus undisputed by the parties—and by a majority of the Court—that the federal courts had jurisdiction to hear the habeas petition. *See id.* at 525 (plurality); *id.* at 541 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

## II. This Court's Jurisprudence Identifies Key Factors That Affect the Availability of Habeas Corpus

Read together, the cases surveyed in Part I demonstrate that this Court has considered a variety of factors relevant in determining whether the writ

of habeas corpus and accompanying relief are available in specific cases of federal executive detention: (1) the status of the detainee (e.g., U.S. citizen or foreign national, civilian or enemy); (2) the location of the detention and of the custodian; (3) the source of the authority for detention (including the kind and nature of the tribunal, court or person authorizing detention); (4) the court in which the petitioner initiated the habeas petition; and (5) the statutory or constitutional jurisdictional predicates upon which the petitioner relied.

The Court has not focused on the same factors in every case nor always weighted all factors equally. Moreover, the Court has not addressed these factors using the same interpretive methodology in every case. At times, the decisions can be read to rely on textualism, whereas other decisions focus more on the common law history of the writ, its function as a structural restraint on the government's conduct, or the writ's fundamental purposes.[8] Taken as a whole, the Court's jurisprudence indicates that the Court has consistently relied upon the intersection of different factors, and not upon any one factor alone, in deciding whether to exercise its habeas jurisdiction in each case.

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[8] *See, e.g.*, William F. Duker, *A Constitutional History of Habeas Corpus* 225-86 (1980); Calabresi & Lawson, *supra* note 3, at 1003-09; Paust, *supra* note 5, at 19, 25; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 981-91 (1998).

### A. Status of the Detainee in Correlation with Other Key Factors

A number of this Court's habeas decisions can best be understood in light of the interaction between the petitioner's citizenship status and the location of his or her detention. When petitioners are held within the territorial jurisdiction of the United States, the Court has exercised its habeas jurisdiction to review the detentions of both citizens and foreign nationals. *See Hamdi*, 542 U.S. at 525 (plurality); *see also, e.g.*, *St. Cyr*, 533 U.S. at 314; *Kaine*, 55 U.S. (14 How.) at 117 (plurality). However, some of this Court's post-World War II decisions indicate that when petitioners are detained abroad, the availability of habeas relief may be more expansive for Americans than for foreigners. *See, e.g.*, *Rasul*, 542 U.S. at 497 (Scalia, J., dissenting) ("The constitutional doubt that the Court of Appeals in *Eisentrager* had erroneously attributed to the lack of habeas for an alien abroad might indeed exist with regard to a *citizen* abroad—justifying a strained construction of the habeas statute, or (more honestly) a determination of constitutional right to habeas.").

Other decisions involved a confluence of factors including citizenship status, location, and the source of authority for detention. For example, in a number of cases in which citizens challenged confinement abroad, the Court reached the merits of their habeas petitions without questioning its own or the lower federal courts' jurisdiction to do so. This was so whether the challenged detentions were authorized by purely U.S. authority, *see Burns*, 346 U.S. at 138-39 (plurality), purely foreign authority,

*see Wilson*, 354 U.S. at 526-529, or by agreement with other nations, *see, e.g.*, *Reid*, 354 U.S. at 15 & n.29, 41 (plurality); *cf. Madsen*, 343 U.S. at 344 & n.3, 370-71.

In other cases, a different group of factors—citizenship status and the basis of jurisdiction invoked—was considered by the Court in determining whether to issue the writ. For example, when U.S. citizens have sought an original writ from this Court without previously filing in a lower court, the Court has declined to entertain their petitions. *See, e.g.*, *Bush*, 336 U.S. at 971 (denying leave to file an original petition); *Betz*, 329 U.S. at 672 (same).

The Court's case law is less clear about how citizenship status interacts with other factors when non-citizens are held outside the territorial United States. In *Hirota*, the petitioners were foreign nationals held in Japan and were sentenced by an international military tribunal; these were among the "foregoing circumstances" the Court enumerated before holding that "the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed" on the petitioners. 338 U.S. at 198. In *Eisentrager*, which expressly precluded habeas corpus for enemy aliens convicted by military tribunals and detained overseas, the Court did not specify whether its holding rested on the petitioners' status as "enemy aliens," their extraterritorial situs, the statutory provisions involved or some combination of all three factors. *See* 339 U.S. at 777. More recently, however, a majority of this Court concluded in *Rasul* that § 2241 reaches even non-

citizens held outside the United States in an area over which the United States exercises plenary but not sovereign control, *see* 542 U.S. at 479.[9]

## B. The Source of the Detention Authority

The nature of the authority behind a detention—be it Executive, judicial, military or otherwise—has proved to be an important factor in determining when habeas jurisdiction will be available.

### 1. Executive Detention Absent Judicial or Military Proceedings

This Court has recognized that, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301. In particular, the "'historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.'" *Rasul*, 542 U.S. at 474 (quoting *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring)). Thus, for instance,

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[9] Section 7(a) of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, adds an express statutory limit to the habeas corpus jurisdiction of the United States in cases brought by certain non-citizens detained as "enemy combatants," or awaiting such determination. The constitutionality of this provision as applied to non-citizens held at Guantánamo is presently before this Court in *Boumediene v. Bush* and *Al Odah v. United States*, Nos. 06-1195, 06-1196 (U.S. argued Dec. 5, 2007).

foreign nationals in *Rasul* and a U.S. citizen in *Hamdi* were detained without trial by the U.S. military and were permitted to invoke federal habeas jurisdiction to challenge their detention. *See Hamdi*, 542 U.S. at 509-11; *Rasul*, 542 U.S. at 470-71, 485.

### 2. Military Tribunals

By the close of the Civil War, it had become clear that the habeas writ could be used to challenge detentions pursuant to the convictions of military tribunals. *See, e.g.*, *Yerger*, 75 U.S. (8 Wall.) at 103; *Milligan*, 71 U.S. (4 Wall.) at 118. A military tribunal's jurisdiction and compliance with statutory procedures may be reviewed by the federal courts. *See, e.g.*, *Milligan*, 71 U.S. (4 Wall.) at 118-27; *see also Reid*, 354 U.S. at 40-41 (plurality); *Quirin*, 317 U.S. at 24-25. Further, convictions do not bar habeas jurisdiction; indeed, this Court has, on habeas review, granted post-conviction relief to American citizens convicted by U.S. military tribunals abroad on the ground that the proceedings before those tribunals were unconstitutional. *See Reid*, 354 U.S. at 3-5; *Toth*, 350 U.S. at 13-14 n.3, 23. Thus far, however, absent statutory authorization, military tribunals' judgments and sentences have not been susceptible to direct review. *See, e.g.*, *Burns*, 346 U.S. at 139-40 (plurality); *Yamashita*, 327 U.S. at 8-9; *Vallandigham*, 68 U.S. (1 Wall.) at 253; *Dynes*, 61 U.S. (20 How.) at 81.

### 3. Foreign Tribunals

While this Court has seldom grappled with the federal courts' authority to review decisions of foreign or international tribunals—either in advance of any actual proceedings or, less frequently, after decision—the Court has sometimes recognized limits on the challenges that may be presented to the proceedings of such courts. For example, this Court has held that where extradition is contemplated pursuant to a congressionally implemented treaty and unless the treaty provided otherwise, a petitioner (even one who is a U.S. citizen) could not challenge his surrender for trial under foreign law on the basis that the foreign proceedings will not guarantee him the same procedural protections as the Constitution. *Neely*, 180 U.S. at 123; *see also, e.g.*, *Wilson*, 354 U.S. at 529-30. *Neely*, however, indicates that there may be procedural requirements with which the foreign proceedings must comply in order for such a transfer to be validated. *See* 180 U.S. at 123. Given the development in due process decisions since that ruling, individuals detained in U.S. custody may be able to seek habeas review prior to their transfer to the custody of other nations where they could be subjected to grave forms of injury.

What this Court's decisions have established thus far is that a petitioner, whether or not a citizen, may use habeas to challenge the constitutional validity of the statutory scheme pursuant to which he is being transferred to foreign authorities, and to ensure that the transfer proceedings themselves and any U.S. detention prior to transfer are authorized

by statute. *See Kaine*, 55 U.S. (14 How.) at 103-04, 108-09 (plurality).

### C. Statutory and Constitutional Predicates for Habeas Jurisdiction

In cases from *McCardle* and *Yerger* in the nineteenth century to *Rasul* in the twenty-first, this Court has consistently attended to the statutory predicate invoked and to the level of the court in which the habeas petition was first filed in determining whether it has jurisdiction. Successive congressional revisions have impacted these determinations. *Compare, e.g.*, *McCardle*, 74 U.S. (7 Wall.) at 508-14 (no jurisdiction for appeal of lower court's denial of habeas after repeal of 1867 statutory provision), *with Yerger*, 75 U.S. (8 Wall.) at 100-02 (jurisdiction under Judiciary Act for original habeas petition in Supreme Court seeking review of denial of habeas petition in lower court). The Court has not read a repeal of one form of statutory habeas jurisdiction to preclude another, absent a specific directive from Congress. *See, e.g.*, *St. Cyr*, 533 U.S. at 298-99 & n.10.

When petitioners have initiated habeas proceedings in this Court, the Court's construction of its own jurisdiction has also been an important factor. *Compare Bollman*, 8 U.S. (4 Cranch) at 100-01 (appellate jurisdiction for habeas review of lower court's order committing prisoner to jail), *with Vallandigham*, 68 U.S. (1 Wall.) at 251-54 (no jurisdiction, including through habeas, for review of

detention pursuant to military commission sentence on which no lower court had previously passed).[10]

## III. Under This Court's Precedents, the Key Factors Barred Habeas Availability in *Hirota* and Require it for Omar and Munaf

The preceding overview shows *Hirota* to be but one of a series of cases that delineate the boundaries of habeas jurisdiction by reference to a combination of key factors. As the Court stated in *Hirota*, its judgment was predicated upon "the foregoing circumstances"; the Court did not indicate that any single factor was dispositive. The combination of these "circumstances" is thus critical to understanding the Court's conclusion that the federal courts had "no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners." 338 U.S. at 198.

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[10] Although this Court has only granted a handful of original habeas petitions since *Yerger* (and none since 1925), it has recognized the continuing availability of such an atypical procedure as recently as last Term. *See, e.g., Boumediene v. Bush*, 127 S. Ct. 1478, 1478 (mem.) (Stevens & Kennedy, JJ., respecting the denial of certiorari) (noting the potential availability of original relief "[i]f petitioners later seek to establish that the Government has unreasonably delayed proceedings under the Detainee Treatment Act of 2005, . . . or some other and ongoing injury" (citation omitted)), *reh'g granted, order vacated by* 127 S. Ct. 3078 (2007); *see also Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (mem.) (Kennedy, J., concurring in the denial of certiorari).

The first of the "circumstances" was that the *Hirota* petitioners were not American citizens but foreign nationals. The second was that they were not detained within the territories of the United States. While in and of itself being a foreign national does not prevent a petitioner from seeking a writ of habeas corpus, *see, e.g.*, *St. Cyr*, 533 U.S. at 26, the Court thus far has not permitted aliens held outside the United States or areas over which the United States has plenary control to seek habeas relief, at least when they have no connection to the United States, *see, e.g.*, *Eisentrager*, 339 U.S. at 777-81.

A third "circumstance" was that the *Hirota* petitioners sought to attack their convictions and sentences by an international military tribunal. *Hirota* thus fits within this Court's decisions holding that federal courts do not have habeas jurisdiction to review the judgment of a military tribunal so long as it is properly constituted and has adhered to appropriate procedural rules. *See, e.g.*, *Yamashita*, 327 U.S. at 5-9. Although these rulings involved U.S. military tribunals, their holdings indicate that a federal court would be no less reluctant to review the judgment of a duly constituted foreign or international military tribunal.

A fourth "circumstance" referred to in *Hirota* was that the petitioners filed for an original writ, and therefore were required to satisfy either the Court's original or appellate jurisdiction under Article III, section 2, clause 2. Petitions for original habeas writs were denied by the Court before and

after *Hirota* as a matter of course. *See, e.g.*, *Bush*, 336 U.S. 971 (mem.); *Betz*, 329 U.S. 672 (mem.).

In contrast, the circumstances of Omar and Munaf do not fall within the parameters of *Hirota*. They are instead consistent with cases where the Court has found that habeas jurisdiction exists.

First, Omar and Munaf are American citizens. Joint Appendix ("J.A.") 32, 110-11. The Supreme Court has never held that the federal courts lack jurisdiction to consider the claims presented in a habeas petition of a U.S. citizen detained abroad by the executive. To the contrary, since 1953, the Court has repeatedly approved of the exercise of jurisdiction over the habeas petitions of such Americans. *See, e.g.*, *Reid*, 354 U.S. at 3-4 (plurality); *Toth*, 350 U.S. at 23; *Burns*, 346 U.S. at 146 (plurality).

Second, Omar and Munaf are detained by U.S. forces that are working in conjunction with other nations as a part of the Multinational Force-Iraq ("MNF-I"), whose operations are authorized by a U.N. resolution. J.A. 42-43, 111. In other instances when U.S. citizens held by the U.S. military working with other nations or pursuant to international authority have filed habeas petitions, the Court has exercised jurisdiction to consider those petitions. *See, e.g.*, *Wilson*, 354 U.S. at 526-30.

Third, Omar and Munaf filed their habeas petitions seeking review of their detention by U.S. forces prior to the judgment of any foreign tribunal. Both remain detained, although Munaf, after filing

for habeas relief, was tried, convicted and sentenced to death by an Iraqi court. *See* J.A. 14, 27-30, 33, 54, 88, 104-06, 111-12. Where, as here, the United States intends to transfer an individual in U.S. custody to a foreign sovereign, the Court's precedents indicate that the individual may properly invoke habeas jurisdiction to challenge that detention and the constitutional and statutory bases for the proposed transfer. *See, e.g.*, *Neely*, 180 U.S. at 123. Whether a foreign court has exercised process over the petitioner after the petition is filed is not relevant to the exercise of habeas jurisdiction. *See, e.g.*, *Wilson*, 354 U.S. at 526-30.

Fourth, neither Omar nor Munaf seek an original writ from this Court; both have duly filed petitions in the D.C. district court, invoking that court's jurisdiction under § 2241. J.A. 27, 104. *Compare Hirota*, 338 U.S. at 198.

## CONCLUSION

As set forth above, different combinations of key factors have been central to the Court's determinations concerning jurisdiction in habeas cases. Under the circumstances presented here, Omar and Munaf are among many other habeas petitioners whom this Court's rulings have recognized may invoke the jurisdiction of the federal

courts "to review the legality of Executive detention." *St. Cyr*, 533 U.S. at 305.

Respectfully submitted,

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FEBRUARY 2008

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